

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

February 15, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 14, 2004

Case No.: TIA-0139

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits for her late husband XXXXXXXXXXXX (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the application should be given further consideration.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part

852 (the Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program.¹

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act - Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Applicant filed an application with the OWA, requesting Physician Panel review of the Worker's lung cancer. The Applicant stated that the Worker was employed as a machinist at the DOE's Oak Ridge Y-12 facility (the site) for approximately 21 years, from March 1954 to September 1975. The Applicant claimed that the Worker's lung cancer was the result of his exposure to hazardous chemicals, in particular beryllium, at the site.

The Physician Panel agreed that the Worker had lung cancer, but concluded that it was not due to toxic exposure at the DOE site. In its report, the Panel referenced the Worker's medical, dispensary, bioassay, and dosimetry records and concluded that "there is no indication in the information provided that [the Worker] had exposure to any substances known to be associated with development of lung cancer other than cigarette smoke and ionizing radiation."² Based

¹ See <http://www.eh.doe.gov/advocacy/index.html>.

² Physician Panel Report at 1.

on its examination of the Worker's dosimetry records, the Panel found that his radiation exposure was "far below the accepted occupational exposure limits."³ The Panel determined that the type of lung cancer which the Worker possessed--squamous cell carcinoma--"is a type related to smoking."⁴ The Panel relied on the plant's dispensary records which indicated that the Worker was a heavy smoker. Ultimately, the Panel concluded that in the absence of evidence that the Worker was exposed to "other substances associated with the development of lung cancer" or over-exposed to ionizing radiation, his "metastatic squamous cell carcinoma of the lung did not arise from or out of his employment at a DOE facility."⁵

The OWA accepted the Physician Panel's negative determination, and the Applicant filed this appeal. In her initial application as well as her appeal, the Applicant states that the Worker was a machinist in the site's beryllium shop and that he "was exposed to significant levels of beryllium because he worked [periodically] in the beryllium shop for six months at a time."⁶ The Applicant also resubmits some of the documentation which formed a part of the original record, including several medical reports from the site's dispensary highlighting the worker's exposure to beryllium and other substances.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12.

We have concluded that the Panel failed to provide an adequate explanation for its determination. The reason is that the Panel did not address the issue of whether the Applicant's exposure to beryllium was a factor in his lung cancer. In her application, the Applicant has indicated that the Worker was frequently exposed to beryllium. The

³ *Id.* at 2.

⁴ *Id.* at 2.

⁵ *Id.* at 2 (Panel's emphasis).

⁶ See Applicant's Appeal Letter.

record supports the Applicant's claim of beryllium exposure. Medical records from the dispensary indicate several instances where the Worker was injured while working with beryllium and reported to the plant physician for treatment. The record also supports the Applicant's contention that exposure to beryllium can cause lung cancer. The Y-12 Site Profile identifies beryllium as a "known or suspected non-radiation lung carcinogen."⁷ Moreover, beryllium and beryllium compounds have also been identified as carcinogens by the U.S. Department of Health and Human Services.⁸ Accordingly, the Panel should have discussed the beryllium exposure and explained whether this exposure could have been connected with the Worker's lung cancer.

As the foregoing indicates, the Panel has not adequately explained the basis for its determination. Accordingly, this application should receive further consideration. The record indicates that, at the time the Panel considered the claim, the National Institute for Occupational Safety and Health (NIOSH) was in the process of performing a dose reconstruction.⁹ This NIOSH dose reconstruction may provide further information that would support the Applicant's Subpart E claim. We note that further review of the application should also take into account a dose reconstruction.

In compliance with Subpart E, this claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's review of this claim does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0139 be, and hereby is, granted as set forth in paragraph 2 below.

⁷ See Y-12 Plant Site Profile, U.S. Department of Energy, Office of Oversight, Environment, Safety and Health (December 1999), at 35.

⁸ See Report on Carcinogens, Eleventh Edition; U.S. Department of Health and Human Services, Public Health Service, National Toxicology Program, available at <http://ntp.niehs.nih.gov/ntp/roc/toc11.html>.

⁹ See Record (Case History).

- (2) The Physician Panel Report failed to explain adequately the basis of its determination. Reconsideration is in order.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 15, 2005